IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.347 OF 2007

Bhaskar S. Kotian .. Petitioner
Versus
Diwakar Shetty & Ors. .. Respondents

Mr.Aspi Chinoy, Senior Advocate with Umesh Shetty, Mr.S.D'Souza i/b.Umesh Shetty & Co. for petitioner
Mr.S.U.Kamdar with Mr.G.R.Kinkhabwala i/b. Mrs.B.Bahulayan for respondent No.1
Mr.D.Zaiwalla for respondent No.2.
Mr.Harinder Toor i/b. Mishra & Co. for applicant in (NMS3751-07)
Mrs.Vaishali Bhilare for respondent No.3.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 30th October 2007.

P.C.

. In this petition under section 9 of the Arbitration and Conciliation Act, 1996, following reliefs are sought:-

"(a) During the pendency of the

arbitral proceedings between petitioner, respondent Nos. 1, 2 and 3 the respondent No.1 and his agents/servants be restrained by an order and injunction of this Court from selling, alienating, disposing of or encumbering the said immovable property more appropriately described in Exh."B" to the present petition"

"(b) During the pendency of arbitral proceedings between the petitioner, respondent Nos. 1,2 and 3, the Court Receiver, High Court Bombay or some other fit and proper person as may be deemed fit by the Hon’ble Court be appointed as Receiver of the said immovable property more appropriately described in Exh."B" to the petition with all the powers under Order XL Rule 1 of the Civil Procedure Code, 1908, with all powers for the

realisation, management, protection, preservation and improvement of the property, the collection of rent from the tenants or such of those powers as this Hon’ble Court may deem fit."

2. The property which is mentioned in these prayers is more particularly described at Exh.B to the petition. It is an immovable property situate at Andheri (East), Mumbai.

3. Mr.Chinoy, learned Senior Counsel appearing for petitioner submits that the petitioner is a partner of a partnership firm, M/s.Megha Sagar Developers of which respondent Nos. 1 and 3 are partners. He submits that respondent No.2 is a company and owner of the immovable property.

4. Respondent No.2 assigned development rights to the partnership firm for a

consideration of Rs.17,50,000/-.

5. It is not disputed before me that there is a deed of partnership dated 10th July 2004, copy of which is annexed as Annexure "A". It is not necessary to make a detailed reference to the said deed or the clauses thereunder because the Arbitration Petition proceeds on the basis that this partnership firm is not dissolved. However, the contention of respondent No.1 is that this partnership firm has been dissolved. Admittedly, there is no dissolution deed but the argument is that the petitioner and respondent No.3 have been paid certain sums in full and final settlement of all their claims and that is how they have walked out of the partnership. It is in such circumstances that the respondent No.1 claims exclusive rights in respect of the immovable property.

6. The argument of Mr.Chinoy is that the

firm has received consideration of Rs.17,50,000/-. Details of the bank account of the firm are set out in the petition. There are certain steps taken by the firm inasmuch as Project Consultants have been appointed for development of this property upon which there are certain structures which have been declared as slums. My attention is invited to the Annexures to the petition in this behalf by them.

7. The argument further is that taking advantage of the fact that the petitioner and respondent No.3 are ordinarily residing in Karnataka, respondent No.1 being put in charge of day to day affairs of the firm and development activities at site, suddenly stopped responding to communication. Upon visit to the immovable property on 10th June 2007, the petitioner and respondent No.3 noticed the Board which has been put up on the property viz., M/s.Megha Property - Diwakar Shetty" i.e. respondent No.1. On

further enquiries, petitioner came to know that there is a deed of conveyance executed on 11th January 2007 in favour of respondent No.1 which is described as Proprietary firm of respondent No.1. Same Firm's name is utilised but it is shown as if respondent No.1 is a sole proprietor.

8. It is in such circumstances, that correspondence ensued between parties and later on between Advocates. Mr.Chinoy's grievance is that during the correspondence, for the first time, it was disclosed that the petitioner and respondent No.3 so also respondent No.1 allegedly agreed to sell the property to one Rajaram Sarda for Rs.80 lakhs and several sums have been paid over to the petitioner and respondent No.3. These sums have been received in full and final settlement, which contention is seriously disputed by Mr.Chinoy. Placing reliance upon the averments at para 20 of the petition, Mr.Chinoy contends that it is inconceivable that the

property and the rights therein have been taken over by the said Sarda who is not at all coming forward to accept the transaction. He submits that this is a fit case where pending arbitral proceedings, rights of the petitioner and respondent No.3 should be protected or else the property would be completely usurped by respondent No.1. Inviting my attention to the averments in the petition and the contents of the Annexures thereto, Mr.Chinoy submits that a strong prima facie case is made out. Balance of convenience is also in favour of the petitioner and he would suffer grave loss, harm and injury in case interim measures as prayed are not granted.

9. My attention is also invited by Mr.Chinoy to the affidavits in reply and rejoinder.

10. For the first respondent, initially Mr.Madon, learned Senior Counsel had appeared and

made without prejudice statement which has been continuing till date. There is status quo maintained with regard to the immovable property. There were certain without prejudice negotiations and talks. Later on Mr.Madon is not appearing in the matter and Mr.Kamdar addressed me today. He invites my attention to the affidavit in reply of the first respondent and his contention is that the petitioner and respondent No.3 cannot file any petition under section 9 of the Arbitration Act. They cannot do so because, they claim to be partners under partnership deed whereas the Arbitration clause/agreement is in a development agreement, copy of which is annexed as Annexure "C". He submits that the Arbitration which is sought to be invoked is not under the partnership deed but under the development agreement. To the development agreement, the proprietary concern is not a party. Further, there is a conveyance on record. In such circumstances, when the firm is not party to the development agreement so also

the proprietary concern, invocation of Arbitration does not arise. His second submission is that it is inconceivable that the parties would keep quiet if they were not paid any sums. He states that now the respondent No.3 has filed affidavit before me and more or less accepted the plea that a sum of Rs.50 lakhs have been received from the respondent. However, some sort of explanation is put forward that this is with regard to the property in Karnataka and not the subject property. He submits that when the petitioner and respondent No.3 are colluding with each other and having accepted the sums, they cannot come forward and seek any discretionary or equitable reliefs. The conduct of petitioner and respondent No.3 is not proper. He submits that admittedly the firm has been wound up and there are materials to demonstrate the same.

11. Second respondent has not filed any affidavit but Mr.Zaiwalla appears for respondent

No.2.

12. Third respondent is appearing through Ms.Bhilare and she invites my attention to the affidavit in reply.

13. There is a Notice of Motion No.3751 of 2007 which has been taken out by the applicants who claim to be slum dwellers and representatives of slum dwellers society.

14. Dealing with this notice of motion first, I am of the view that the remedy of the applicants who claim to be members of a proposed cooperative housing society of slum dwellers/office bearers is not to move this Court by way of notice of motion. Above all, Mr.Toor appearing for applicants, has been unable to point out to me as to how the proposed society of slum dwellers, who have encroached and squatted on immovable property, can have any interest

therein. There is no document annexed to the affidavit in support. Each of the statements in the affidavit in support have been denied by the petitioner through his constituted attorney. The petitioner has pointed out that the second respondent claims ownership rights in the property. The second respondent could not be deprived of the said rights even by the firm. In such circumstances, the so called slum dwellers cannot approach this Court in private dispute.

15. There is much substance in the contention of the petitioner in this behalf. Having perused the notice of motion and affidavit in support so also the affidavit in reply, I am of the view that the same is not the remedy for the slum dwellers. If they wish to assert any right in the development of the property, their remedies are distinct and in tact. They can never be affected by the outcome of the present petition. The notice of motion is, therefore, misconceived

and is accordingly dismissed.

16. In the light of the peculiar facts of the case, there is no necessity to make any reference to the provisions of section 9 or the judgements cited by Mr.Toor.

17. Coming to the main petition, in my view, a prima facie case is indeed made out by the petitioner. A perusal of Exh.A to the petition would show that the partnership deed is entered into by the petitioner, respondent No.1 and 3. It is dated 10th July 2004. This partnership deed pertains to the business of Megha Sagar Developers. The partnership is deemed to have come into effect from 10th July 2004. The firm's name, business and place is set out in detail in clauses 2 and 3. Profit sharing ratio is set out in clause 5 of the deed. It has been very clearly stated therein that the third partner viz., respondent No.1 shall manage all day to day

affairs of the firm. Clauses 8 and 9 of the deed read thus:-

> "8. No partner shall, without the consent of the other partner;
>
> (a) ASSIGN or mortgage his share or interest in the partnership; AND
>
> (b) COMPOUND or relinquish or discharge any debts, which shall be due or owing to the partnership without receiving the full amount"
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> "9. The partnership shall maintain true and correct account of its income and expenditure in the accustomed form of maintaining accounts. It shall be accessible to the partners for

inspection. A general account shall be taken on 31st day of March every year. A balance sheet setting out all assets and liabilities of the firm as at that date and profit and loss account for the period shall be prepared. The general account for the first period shall be taken on 31st March 2005."

18. Clause 18 is Arbitration clause. The same reads thus-

"18. All disputes and differences whatsoever, which shall, either during the partnership or after the termination thereof, arise between the partners or their respective representatives or between any partners and the representative of any other partners touching these presents or application thereof any clause or thing herein

> contained, or any account, valuation, division, debts or liabilities to be made hereunder or as to any other matter in or the rights, duties or liabilities of any person under these presents, shall be referred to and settled only by arbitration under the provisions of the Indian Arbitration Act in force for the time being."

19. This deed is signed by the partners. In sofar as Annexure "C" is concerned, that is development agreement to which the owners viz., respondent No.2 and partnership firm so also the partners individually, including their respective heirs, executors, administrators are parties. The development agreement is for developing the property which is occupied by the slums and has various clauses including empowering the firm to sell the units. It is not necessary to go into further details with regard to the nature of

rights conferred by Exh.C. Suffice it to say that the schedule to Annexure "C" is clear inasmuch as the very property which is described at Annexure "B" to the petition is forming part of the development agreement. The first respondent has paid the amount of Rs.17,50,000/- which is received by the second respondent directly. The sketch is also annexed. Similarly, extract of account of the firm with Punjab and Maharashtra Coop.Bank is also placed on record. A copy of the Project Consultant’s report and the terms of his appointment is at Annexure "E".

20. It is in such circumstances that the so called rights which are conferred exclusively upon first respondent by the alleged deed of conveyance would have to be seen. Prima facie, there is substance in the contention of Mr.Chinoy that the Arbitrator will have to go into and scrutinise in depth the claim of the first

respondent that all rights in the property have been made over to him upon dissolution of the partnership. Prima facie, at this stage, nothing conclusive can be said and rather should not be said and observed. I do not wish to prejudice the case of parties before the Arbitral Tribunal. Suffice it to state that the version of the first respondent on affidavit has been disputed and denied in rejoinder by petitioner.

21. In this behalf, a reference can be made to paras 5, 6 and 7 of the affidavit in reply. Therein, the stand of the first respondent is that the firm was indeed existing. He does not dispute that the firm had acquired development rights. The identity of property is not disputed either. However, it is contended that the development rights later on, with consent of all partners have been sold to Sarda by MOU dated 4th September 2006 for total consideration of Rs.85 lakhs and payment is made in the manner set out.

Curiously, Mr.Sarda agrees that despite receiving all payment, respondent No.1 continued with the development of property. Thus, respondent No.1 has pleaded an arrangement between himself and Sarda, the purchaser. As to whether, this is a genuine and bonafide transaction and whether there is consent of all partners thereto, is something, which must be gone into in details before the Tribunal. This is not a stage at which any conclusive finding can be rendered. Prima facie, when a partner has set up a case that the partnership firm has been dissolved by consent and all amounts paid to partners in furtherance of their share, then, it would be for the first respondent to establish that the firm is indeed dissolved and the amount has been paid in full and final settlement of the claims. Merely stating on affidavit that the firm is dissolved is not enough. The contents of the said document together with version of the first respondent will have to be placed before the

Arbitrator and it is only upon proof of the said fact in accordance with the settled principles, that the Arbitrator would render ultimate finding. My attention is also invited to the fact that the owners of the property viz., Respondent No.2 have executed conveyance, but the impression that they had was that the rights of the firm were intact.

22. My attention is also invited to the affidavit of respondent No.3.

23. Thus, this is a case where until the version of the first respondent is placed before the Tribunal and tested in accordance with the principles of natural justice, the subject matter of the Arbitration must be preserved and protected. There is no substance in the contention of Mr.Kamdar that this Court has no jurisdiction to entertain this application under section 9 of the Arbitration Act. Having perused

the annexures A and C in some details together with jurisdiction clause, it is apparent to me that each one of the partner being party to both documents and the prima facie settled position, that the partnership firm would have no independent existence other than the partners, then, it was open for the petitioner to invoke even the arbitration under the development agreement. These are only prima facie and tentative findings because nothing prevents first respondent to challenge the jurisdiction of the Arbitral Tribunal in accordance with the procedure laid down.

24. However, upon perusal of the documents and respondent No.1 having furnished explanation upon merits as well, it is not possible to accept the plea that the petition should be thrown out on the ground that it is not maintainable.

25. For the reasons that I have recorded

hereinabove, prima facie case is indeed made out. Unless and until, it is decided that the business of partnership has come to an end and it has been dissolved so also the account settled, it will not be proper to continue activity at site. As to who is the developer and who is dealing with the property is indeed not clear. Further complications would arise, if third party rights are created.

26. In such circumstances, balance of convenience is in favour of petitioner and if the reliefs are not granted in terms of prayer clause (a) of the petition, grave and irreparable loss, harm and injury would be caused to the petitioner. Therefore, the petition is made absolute in terms of prayer clause (a). No costs.

(S.C.DHARMADHIKARI, J)